



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 966/19

In the matter between:

MFANAWENKHOSI M. SIHLONGONYANE

PLAINTIFF

AND

GILBERTO PEREIRA

1st DEFENDANT

WELCOME TRANSPORT (Pty) Ltd

2nd DEFENDANT

Neutral citation: *Mfanawenkhoosi M. Sihlongonyane vs Gilberto Pereira & Another [966/19] [2019] SZHC 211 (13th November, 2019)*

Coram: FAKUDZE, J

Heard: 2nd October, 2019

Delivered: 13th November, 2019

Summary: *Civil procedure – Application for summary Judgment – triable issues raised by Defendant –application for Summary Judgment dismissed with costs.*

BACKGROUND

[1] The Plaintiff has instituted Summary Judgment proceedings against the Defendants following the issuance of Combined Summons for the payment of E140,000.00 (One Hundred and Forty Thousand Emalangeni). The payment is in respect of a caterpillar tractor that was bought by the Plaintiff.

THE PARTIES' CONTENTION

The Plaintiff

[2] The Plaintiff alleges that there was an agreement between himself and the 1st Defendant to the effect that the 1st Defendant would sell a tractor to the Plaintiff. The 1st Defendant said that the Plaintiff should pay the full amount as the tractor was in good condition, yet he knew that he was misleading the Plaintiff.

[3] The Plaintiff made full payment of the purchase price by depositing the money into the personal bank account of the 1st Defendant and the 2nd Defendant. This was according to the instructions of the 1st Defendant. After payment, the Plaintiff inspected the tractor and found that it was not in good condition as promised by the 1st Defendant. The Plaintiff is therefore

seeking a refund of the said sum of E140, 000.00 (One Hundred and Forty Thousand Emalangeni).

The Defendants

- [4] The 1st Defendant denies any dealings with the Plaintiff and has raised the non-joinder of Louis Perreira. The said Louis Pereira is the one who the 1st Defendant alleges dealt with the Plaintiff. In other words, the 1st Defendant's defence is that he never at any time dealt with or sold a tractor to the Plaintiff but the said Louis Perreira did.
- [5] The Defendant further alleges that in the Plaintiff's particulars claim it was stated that the agreement between the parties was oral. At page 7 of the Book of pleadings paragraph 13, mention is made of a contract entered into. It is therefore not clear whether the contract between the parties was oral or in writing. The triable issues according to the 1st Defendant, pertains to the fact that the Defendant never entered into a contract with the Plaintiff and that the two have never met. The other triable issue pertains to the nature of the contract that, whether it was oral or in writing.

THE APPLICABLE LAW

- [6] In the **Small Enterprises Development Company v Cloete Ntombi Bhembe t/a Computer Proficiency Training Centre and Business College, Civil Appeal case no.38(2014) SZSC (30 December 2014)** the Supreme Court stated as follows:

[12] *“Now the principles governing Summary Judgment are well settled in this Jurisdiction. The Court proceeds from the premise that Summary Judgment is an extra ordinary and*

stringent procedure which is primarily designed to provide a speedy remedy to a plaintiff in case where the defendant has no bona fide defence and where appearance to defend has been made solely for the purposes of delay.”

[7] Likewise in **Supa Swift (Swaziland) Pty Ltd v Guard Alert Security Services Ltd Case No 4328/09**, the Court stated as follows:

“A Summary Judgment is one given in favor of a plaintiff without a plenary trial of action. The normal steps of filing all necessary pleading, hearing of witnesses and addresses by counsel before the Court’s Judgment are not followed. The procedure by way of Summary Judgment is resorted to by a plaintiff where obviously there can be no reasonable doubt that the plaintiff is entitled to Judgment and where it is expedient to allow the Defendant to defend for mere purposes of delay. It is for the plain and straight forward not for the devices and crafting. Rather than suffer unnecessary delay and expense which attend a full trial, plaintiff may therefore apply to the Court for instant Judgment if his claim is manifestly unanswerable both in fact and in law.”

[8] In **Mater Dolorosa High School V R.J.M Stationery (Pty) Ltd Appeal Case No. 3, 2005**, the Court pronounced that the existence of a triable issue is a bar to the granting of summary Judgment. Therefore if the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff’s claim the Court cannot deny him an opportunity of having such issue tried.

COURT'S ANALYSIS AND CONCLUSION

[9] The 1st Defendant has raised two issues in resisting summary Judgment. The first issue pertains to whether the agreement between the parties was both oral and in writing. With respect to the written contract, Louis Perreira signed it and Gilberto Perreira is not a signatory. In this Court's view that this is a triable issue.

[10] The second triable issue pertains to who the contracting parties were. The Plaintiff alleges that he entered into a contract with Gilberto Pereira whereas the 1st Defendant alleges that he does not know anything about the contract. The contracting party was Louis Pereira. The 1st Defendant evidences this by a purported agreement signed by the said Louis Perreira as the seller. This issue is therefore triable. Oral evidence can assist in determining it.

[11] In light of all that has been said above, the application for summary Judgment is dismissed with costs.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

CROWN: S. MABILA

DEFENDANT: S. MASEKO